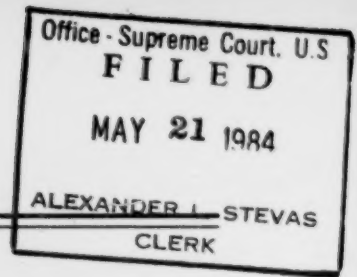


83 - 1898

No.



IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

SEA-LAND SERVICE, INC.,

Petitioner,

v.

ELIZABETH HANFORD DOLE,
SECRETARY OF TRANSPORTATION, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

EDWARD M. SHEA

Counsel of Record

JOHN E. VARGO

MARTIN J. FITZGERALD

900 17th Street, N.W.

Washington, D.C. 20006

(202) 296-4750

Of Counsel:

RAGAN & MASON

900 17th Street, N.W.

Washington, D.C. 20006

Attorneys for Petitioner

Sea-Land Service, Inc.

378P



QUESTIONS PRESENTED

1. Is the Maritime Subsidy Board's interpretation of Section 605(c) of the Merchant Marine Act, 1936 as being inapplicable to a provision of an operating-differential subsidy contract which would authorize nonsubsidized operations by contract vessels entitled to judicial deference?

2. Taking into account the purposes and policy of the Merchant Marine Act, 1936 and Section 605(c) thereof, should Section 605(c) be interpreted to be applicable to a provision of an operating-differential subsidy contract which would authorize the initiation of nonsubsidized operations by contract vessels, where those operations would be on an essential trade route already served by other U.S.-flag operators?

REFERENCE TO PARTIES BELOW

The following were the parties to the proceeding below:

Sea-Land Service, Inc., which is wholly owned by Sea-Land Corporation, which is in turn wholly owned at present by R. J. Reynolds Industries, Inc.¹ Affiliates of Sea-Land Service, Inc. are Sea-Land Industries U.S.A., Inc., Sea-Land Industries (Bermuda), Intersea Operations Ltd., Sea Readiness, Inc., and Tacoma Terminals, Inc.;

Elizabeth Hanford Dole, Secretary of Transportation;

Harold E. Shear, Maritime Administrator and Chairman, Maritime Subsidy Board;

Garrett Brown, Jr., Member, Maritime Subsidy Board;

Warren G. Leback, Member, Maritime Subsidy Board;

Maritime Subsidy Board; and

Waterman Steamship Corporation.

¹ However, on April 25, 1984 the Board of Directors of R. J. Reynolds Industries, Inc. approved a plan to divest Sea-Land Corporation by distributing all of its outstanding Common Stock on a pro rata basis to holders of Reynolds Common Stock. The distribution is to occur on June 19, 1984.

TABLE OF CONTENTS

	<u>Page</u>
OPINIONS BELOW	1
JURISDICTION OF THE COURT	2
STATUTE INVOLVED	3
STATEMENT OF THE CASE	4
I. AGENCY PROCEEDINGS	5
II. COURT PROCEEDINGS	8
REASONS FOR GRANTING THE WRIT	9
I. THE MARITIME SUBSIDY BOARD'S INTERPRETATION OF SECTION 605(c) OF THE MERCHANT MARINE ACT, 1936 AS BEING INAPPLICABLE TO A PROVISION OF AN OPERATING-DIFFERENTIAL SUBSIDY CONTRACT WHICH WOULD AUTHORIZE NONSUBSIDIZED OPERATIONS BY CONTRACT VESSELS IS NOT ENTITLED TO JUDICIAL DEFERENCE.	9
A. Criteria for Judicial Deference	9
1. Introduction	9
2. The <i>Train</i> Case	10
3. The <i>Federal Election Commission</i> Case	11
4. Other Cases	12
5. Conclusion	14
B. The Board's Interpretation Is Not Entitled to Judicial Deference	14
1. Introduction	14
2. Thoroughly Considered Construction	15
3. Consistent Construction	15
4. Contemporaneous Construction	16
5. Validly Reasoned Construction	17
6. Conclusion	21

II.	IN IMPLEMENTATION OF THE PURPOSES AND POLICY OF THE MERCHANT MARINE ACT, 1936 AND SECTION 605(c) THEREOF, SECTION 605(c) SHOULD BE INTERPRETED TO BE APPLICABLE TO A PROVISION OF AN OPERATING-DIFFERENTIAL SUBSIDY CONTRACT WHICH WOULD AUTHORIZE THE INITIATION OF NONSUBSIDIZED OPERATIONS BY CONTRACT VESSELS, WHERE THOSE OPERATIONS WOULD BE ON AN ESSENTIAL TRADE ROUTE ALREADY SERVED BY OTHER U.S.-FLAG OPERATORS.	21
A.	Introduction	21
B.	Purpose of the Section and of the Act	24
C.	Applying Section 605(c) to Proposed Nonsubsidized Operations by Subsidized Operators Which Are Otherwise Within Its Terms Is Consistent with the Purpose of the Section and of the Act	27
	CONCLUSION	30

TABLE OF AUTHORITIES

	<u>Page(s)</u>
COURT CASES	
<i>Adamo Wrecking Co. v. United States</i> , 434 U.S. 275 (1978)	10,11,15
<i>Batterton v. Francis</i> , 432 U.S. 416 (1977)	12,14
<i>Federal Election Comm'n v. Democratic Senatorial Campaign Comm.</i> , 454 U.S. 27 (1981)	10,11,12, 15,30
<i>General Electric Co. v. Gilbert</i> , 429 U.S. 125 (1976) ..	10,11,12, 14,17
<i>NLRB v. Hendricks Cty. Rural Electric Membership Corp.</i> , 454 U.S. 170 (1981)	16
<i>Norwegian Nitrogen Products Co. v. United States</i> , 288 U.S. 294 (1933)	16
<i>St. Martin Lutheran Church v. South Dakota</i> , 451 U.S. 772 (1981)	13,14,16
<i>Saint Mary of Nazareth Hospital Center v. Schweiker</i> , 718 F.2d 459 (D.C. Cir. 1983)	14
<i>Sea-Land Service, Inc. v. Connor</i> , 135 App. D.C. 306, 418 F.2d 1142 (1969)	20
<i>Sea-Land Service, Inc. v. Kreps</i> , 185 App. D.C. 98, 566 F.2d 763 (1977)	25,26,27
<i>Seatrain Shipbuilding Corp. v. Shell Oil Co.</i> , 444 U.S. 572 (1980)	22
<i>SEC v. Sloan</i> , 436 U.S. 103 (1978)	13,15,16
<i>Skidmore v. Swift & Co.</i> , 323 U.S. 134 (1944)	9,10,11, 12,13,14
<i>Train v. Natural Resources Defense Council</i> , 421 U.S. 60 (1975)	10,11,12
<i>Udall v. Tallman</i> , 380 U.S. 1 (1965)	16
<i>Zenith Radio Corp. v. United States</i> , 437 U.S. 443 (1978)	16
AGENCY CASES	
<i>Additional Subsidized Service on Trade Routes 29 & 17</i> , 14 Pike & Fischer Shipping Regulation Reports ("S.R.R.") 387 (MSB 1974).....	19,25
<i>American President Lines, Ltd.</i> , 12 S.R.R. 168 (MSB 1971).....	19

<i>American President Lines, Ltd.</i> , 21 S.R.R. 1 (MSB 1980)	25
<i>American President Lines, Ltd.—Atlantic/ Straits Service</i> , 1 M.A. 143 (1963)	25
<i>American South African Line, Inc., Seas Shipping Co., Inc.</i> , 3 U.S.M.C. 277 (1938)	19
<i>Atlantic Express Lines of America, Inc.</i> , 1 M.A. 104 (Sec'y of Comm. 1963)	26
<i>Lykes Bros. Steamship Co., Inc.</i> , 7 S.R.R. 643 (MSB 1966)	20,25
<i>Lykes Bros. Steamship Co., Inc.</i> , 18 S.R.R. 1389 (MSB 1978)	26
<i>National Shipping Corp.</i> , 14 S.R.R. 543 (MSB 1974) .	25
<i>States Marine Corp.</i> , 1 S.R.R. 1 (MSB 1959)	20

STATUTES

Maritime Act of 1981, Pub. L. No. 97-31, 95 Stat. 151	4
Merchant Marine Act, 1936, as amended, 46 U.S.C. Ch. 27	
Section 101, 46 U.S.C. § 1101	24
Section 211(a), 46 U.S.C. § 1121(a)	5
Subch. VI	4
Section 601, 46 U.S.C. § 1171	22
Section 603(a), 46 U.S.C. 1173(a)	22
Section 605(c), 46 U.S.C. § 1175(c)	passim

OTHER AUTHORITIES

Department of Commerce Organization Order 25-2, 45 Fed. Reg. 80857 (1980)	23,24
Determination Relative to Certain Non-Subsidized Voyages of Subsidized Operators of Vessels, 46 Fed. Reg. 48198 (1981)	18,19
Maritime Administration General Order 80, 46 C.F.R. §§ 281.11-281.17	17,18,19, 20,23
U.S. Dep't of Commerce, Maritime Admin., Essential United States Foreign Trade Routes (1975)	5



IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

SEA-LAND SERVICE, INC.,
Petitioner,

v.

ELIZABETH HANFORD DOLE,
SECRETARY OF TRANSPORTATION, *et al.*,
Respondents.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

OPINIONS BELOW

The opinion delivered upon the rendering of the judgment sought to be reviewed is that of the United States Court of Appeals for the District of Columbia Circuit in *Sea-Land Service, Inc. v. Dole*, No. 82-1712, decided December 23, 1983. That opinion is reported at 723 F.2d 975, and it is reprinted as Appendix A hereto.

That opinion affirmed the judgment of the U.S. District Court for the District of Columbia in *Sea-Land Service, Inc. v. Lewis*, Civil Action No. 79-1100, decided April 27, 1982. The opinion delivered upon the rendering of that judgment is reported at 21 Pike & Fischer Shipping Regulation Reports ("S.R.R.") 950, and it is reprinted as Appendix G hereto.

The opinions of the administrative agency below were reported as follows:

Waterman Steamship Corp., Initial Decision, Maritime Subsidy Board Docket Nos. S-421, S-455, Jan. 17, 1977: 17 S.R.R. 25 (Appendix B hereto);

Waterman Steamship Corp., Final Opinion and Order, Maritime Subsidy Board Docket Nos. S-421, S-455, Sept. 5, 1978: 18 S.R.R. 925 (Appendix C hereto);

Waterman Steamship Corp., Order Denying Reconsideration, Maritime Subsidy Board Docket Nos. S-421, S-455, Nov. 16, 1978: 18 S.R.R. 1257 (Appendix D hereto);

Waterman Steamship Corp., Order Denying Requests for Reopening, Maritime Subsidy Board Docket No. A-129, Jan. 19, 1979: 18 S.R.R. 1550 (Appendix E hereto);

In the Matter of: Unsubsidized Operations by Waterman Steamship Corp. on Trade Routes 5-7-8-9, 6 and 11 Under Contract No. MA/MSB-450, Order of the Acting Under Secretary of Commerce, Feb. 15, 1979: unreported (Appendix F hereto).

JURISDICTION OF THE COURT

The judgment of the Court of Appeals was entered on December 23, 1983. Upon application of Sea-Land Service, Inc. filed on March 8, 1984, the Chief Justice on March 9, 1984 issued an Order (No. A-722) extending the time for filing a petition for writ of certiorari in this case to and including May 21, 1984.²

² The basis of the Application was that Sea-Land Service, Inc. then had a petition pending before the Maritime Administration which, if granted, would moot this case. The Maritime Administration has not yet acted upon that petition, and so it has become necessary for Sea-Land Service, Inc. to initiate proceedings in this Court.

This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. § 1254(1), which authorizes review of judgments of courts of appeals by writ of certiorari.

STATUTE INVOLVED

Section 605(c) of the Merchant Marine Act, 1936, as amended, 46 U.S.C. § 1175(c), provides as follows:

(c) Vessels to be operated in an essential service served by citizens of the United States.

No contract shall be made under this subchapter with respect to a vessel to be operated in an essential service served by citizens of the United States which would be in addition to the existing service, or services, unless the Secretary of Commerce shall determine after proper hearing of all parties that the service already provided by vessels of United States registry is inadequate, and that in the accomplishment of the purposes and policy of this chapter additional vessels should be operated thereon; and no contract shall be made with respect to a vessel operated or to be operated in an essential service served by two or more citizens of the United States with vessels of United States registry, if the Secretary of Commerce shall determine the effect of such a contract would be to give undue advantage or be unduly prejudicial, as between citizens of the United States, in the operation of vessels in such essential service unless following public hearing, due notice of which shall be given to each operator serving such essential service, the Secretary of Commerce shall find that it is necessary to enter into such contract in order to provide adequate service by vessels of United States registry. The Secretary of Commerce in determining for the purposes of this section whether services are competitive, shall take into consideration the type, size, and speed of the vessels employed, whether passenger or cargo, or combination passenger and cargo, vessels, the ports or

ranges between which they run, the character of cargo carried, and such other facts as he may deem proper.³

The complete text of Section 605 is reprinted as Appendix I hereto.

STATEMENT OF THE CASE

This case presents an important issue regarding the prerequisites for judicial deference to a statutory interpretation of an administrative agency. While the subject matter of this case is an interpretation of Section 605(c) of the Merchant Marine Act, 1936, 46 U.S.C. § 1175(c) (hereinafter "Section 605(c)") by the Maritime Subsidy Board (hereinafter "Board"), it has pervasive implications for all administrative agencies, as well as for the courts which are called upon to review the statutory interpretations they render. As will be explained in greater detail in this Statement *infra*, the interpretation at issue here was rendered by the Board without any accompanying analysis or explanation whatsoever. However, the Court of Appeals reviewed that statutory interpretation using a "sufficiently reasonable" standard of review, and the Court held that that interpretation was sufficiently reasonable to be allowed (Appendix A, at 7a).

This case arises in the context of the award by the Board of an operating-differential subsidy contract, Contract No. MA/MSB-450, to Waterman Steamship Corporation (hereinafter "Waterman") under Subchapter VI of the Merchant Marine Act, 1936, 46 U.S.C. Ch. 27 (hereinafter "Act"). Section 605(c) of the Act provides, in pertinent part, that no contract may be made under that Subchapter for the initiation of service on an essential trade route already served by other

³ The Maritime Act of 1981, Pub. L. No. 97-31, 95 Stat. 151, which became effective on August 6, 1981, transferred the Maritime Administration to the Department of Transportation, and all functions, powers, and duties of the Secretary of Commerce relating thereto to the Secretary of Transportation. However, that Act also provides that except for substitution of the Secretary of Transportation as a party in any action the subject of which has been transferred to him, the Act does not affect actions commenced prior to its effective date, and proceedings therein are to be had in the same manner and effect as if the Act had not been enacted. Section 9(c), (d), 95 Stat. 152-153.

U.S.-flag operators, unless the Board determines, after proper hearing of all parties, that:

1. the service already provided by U.S.-flag operators is inadequate, and
2. additional vessels should be operated thereon in accomplishment of the purposes and policy of the Act.

The agency proceedings relevant to the award of Contract No. MA/MSB-450 are next summarized, and the proceedings in the courts below are summarized after that. As will be seen, the particular interpretation of Section 605(c) which is at issue here was not rendered until quite late in the agency proceedings.

I. AGENCY PROCEEDINGS.

On August 17, 1973 Waterman filed an application which, as subsequently amended, sought operating-differential subsidy (hereinafter "ODS") for the following operations: required service (that is, subsidized service for which minimum and maximum numbers of sailings per year are specified in the contract) on Trade Route ("TR") 21; and privilege service (that is, subsidized service for which no minimum number of sailings is specified in the contract) on TR's 5-7-8-9, 6 and 11 (Appendix B, at 1b). TR 21 covers the trade between the U.S. Gulf ports and ports in Western Europe, while TR's 5-7-8-9, 6 and 11 cover, essentially, the trade between the U.S. Atlantic Coast ports and the Western European, Scandinavian and Baltic ports.⁴ Hence the privilege service contemplated by this application involved calling at the U.S. Atlantic Coast ports to load or discharge cargo both before and after crossing the Atlantic on certain TR 21 voyages, all to be done with subsidy.

Subsequently, on June 16, 1975, Waterman filed a separate application for ODS to conduct certain required service on TR's 5-7-8-9, 6 and 11 (Appendix B, at 1b). The two applications were assigned, respectively, Docket Nos. S-421 and S-455 by the Board. Sea-Land, an unsubsidized U.S.-flag carrier serving

⁴ Maps showing all of the trade routes involved, reproduced from the Department of Commerce publication, Essential United States Foreign Trade Routes, appear as Appendix K hereto; essential trade routes are designated pursuant to § 211(a) of the Act, 46 U.S.C. § 1121(a).

all of the trade routes covered by the applications, filed protests and petitions for leave to intervene, as did two other carriers, and the matters were separately referred to the Office of Administrative Law Judges for hearing and an Initial Decision on the issues set forth in Section 605(c) of the Act (*id.* at 1b-2b). As was noted above, those issues include the adequacy of existing U.S.-flag service on the trade route(s) specified in the application, and whether the proposed new service would be in furtherance of the purposes and policy of the Act. Proceedings on the two matters were consolidated and hearings, in which Sea-Land participated, were held in late 1975 and early 1976 (*id.* at 2b).

In his Initial Decision issued on January 17, 1977, the Administrative Law Judge found, *inter alia*, that U.S.-flag service on the four trade routes involved was inadequate, that additional vessels should be operated thereon in the accomplishment of the purposes and policies of the Act, and hence that Section 605(c) was not a bar to the award of an ODS agreement to cover the involved operations (Appendix B at 60b).

Exceptions to the Initial Decision were filed with the Board by both Sea-Land and Waterman, and in its Final Opinion and Order issued on September 5, 1978, the Board affirmed the Initial Decision only insofar as it concerned TR 21. The Board found that the proposed service on TR's 5-7-8-9, 6 and 11 was barred by Section 605(c), because (1) contrary to the Initial Decision, U.S.-flag service on TR 5-7-8-9 was and would for the foreseeable future be adequate, and (2) while U.S.-flag service on TR's 6 and 11 was and would for the foreseeable future be inadequate, Waterman failed to show that its proposed operations on those routes would further the purposes and policy of the Act (Appendix C, at 27c).

On September 19 and 21, 1978, Waterman filed petitions for reconsideration of the Board's Final Opinion and Order insofar as it concerned TR's 5-7-8-9, 6 and 11, and on November 16, 1978, the Board issued an Order Denying Reconsideration. In the Order, the Board reaffirmed its earlier determination that Section 605(c) barred the proposed service on these routes (Appendix D, at 8d).

On September 18, 1978, the day before Waterman filed its first petition for reconsideration, it submitted to the Board a self-styled "Revised Application" for ODS on TR 21, and this application sought, in addition, authority to serve TR's 5-7-8-9, 6 and 11 on a nonsubsidized basis (Appendix L, at 11). Despite the Board's findings—which it had affirmed only five days earlier—that U.S.-flag service on TR 5-7-8-9 was adequate and that Waterman had not shown that its proposed service on TR's 6 and 11 would further the purposes and policy of the Act, the Board approved the Revised Application and entered into ODS Contract No. MA/MSB-450 with Waterman on November 21, 1978 (Appendix L). The letter of the Maritime Administration to Waterman of that date announcing approval of the Revised Application gives no explanation of the statutory authority relied upon by the Board in granting Waterman the requested authority to provide nonsubsidized service on TR's 5-7-8-9, 6 and 11 (*id.*, see in particular at 101–111). No public notice or hearing whatsoever was provided with regard to the Revised Application.

On December 11, 1978 Sea-Land filed a petition for reconsideration of the Board's action of November 21, 1978, only insofar as it authorized Waterman to conduct the nonsubsidized operations (Appendix M). Therein Sea-Land urged the Board to initiate Section 605(c) proceedings on the September 18, 1978 application. On January 19, 1979 the Board issued a brief order denying this petition, as well as one filed by Farrell Lines, Inc. As to the substantive issues raised in the petitions, the Board's order stated only as follows:

The Board was well aware of these issues when it considered and undertook the actions on November 21, 1978. Neither Sea-Land nor Farrell raise any new issue that was not anticipated and rejected by the Board in its deliberations. We find no basis therefore for reconsidering our action. (Appendix E, at 4e).

Sea-Land then petitioned the Secretary of Commerce for review of the Board's action, and its petition for review was

denied in an Order of February 15, 1979 (Appendix F), the entirety of which is follows:

The petitions for review of the Maritime Subsidy Board decision have been considered and are hereby denied.

Turning to the terms of the Contract which the Board entered into with Waterman, Contract No. MA/MSB-450, there is, in Appendix A thereof, a description of both the service for which subsidy is provided, and the nonsubsidized operations in which vessels covered by the Contract may engage (Appendix L, at 261-271). It is further provided therein that the operator may conduct the nonsubsidized operations either in conjunction with its subsidized service, or as separate voyages independent of its subsidized service. Where the nonsubsidized operations are conducted in conjunction with the subsidized service, the total time consumed in calling at the U.S. Atlantic Coast ports is not to be included in calculating the subsidy.

II. COURT PROCEEDINGS.

Sea-Land brought suit against the Secretary of Commerce, the Maritime Subsidy Board, and its members, in the United States District Court for the District of Columbia on April 20, 1979, seeking injunctive and other relief against implementation of the provision of the Contract authorizing nonsubsidized operations. The basis for jurisdiction of the action was Sections 1331 and 1337 of the Judicial Code, 28 U.S.C. §§ 1331, 1337. The motion of Waterman to intervene as a party defendant was granted on July 13, 1979. Thereafter, Sea-Land moved for summary judgment, the Federal Defendants moved for judgment on the pleadings, and Waterman moved to dismiss. In its opinion of April 27, 1982 (Appendix G) the District Court treated the defendants' motions as a consolidated motion for summary judgment, and it granted that motion, holding that the provisions of Section 605(c) are applicable only to those operations for which subsidy is being sought. Judgment in favor of defendants was entered on that same date.

Sea-Land then appealed that judgment to the United States Court of Appeals for the District of Columbia Circuit. In

the above-noted opinion issued on December 23, 1983 (Appendix A), the Court affirmed that judgment.

It should also be noted that on December 1, 1983, prior to the issuance of the opinion of the Court of Appeals, Waterman filed a petition for reorganization pursuant to Chapter 11 of the Bankruptcy Code (Case No. 83B 11732 (HCB), Bankruptcy Court for the Southern District of New York). Nevertheless, the issues presented in this case are very important ones, and that development in no way diminishes either their importance, or Sea-Land's need to seek the decision of this Court on them.

REASONS FOR GRANTING THE WRIT

I. THE MARITIME SUBSIDY BOARD'S INTERPRETATION OF SECTION 605(c) OF THE MERCHANT MARINE ACT, 1936, AS BEING INAPPLICABLE TO A PROVISION OF AN OPERATING-DIFFERENTIAL SUBSIDY CONTRACT WHICH WOULD AUTHORIZE NONSUBSIDIZED OPERATIONS BY CONTRACT VESSELS IS NOT ENTITLED TO JUDICIAL DEFERENCE.

A. Criteria For Judicial Deference.

1. Introduction.

This Court, in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), articulated the following rule governing the weight to be accorded to agency rulings and interpretations:

We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it

power to persuade, if lacking power to control. *Id.* at 140.

In 1976 the Court referred to *Skidmore* as the "most comprehensive statement of the role of interpretative rulings." *General Electric Co. v. Gilbert*, 429 U.S. 125, at 141 (1976).

The test utilized by the Court of Appeals in this case was "whether the agency's construction is 'sufficiently reasonable' to be allowed." (Appendix A, at 7a). The Court of Appeals cited two of this Court's cases in support: *Federal Election Commission v. Democratic Senatorial Campaign Committee*, 454 U.S. 27 (1981), and *Train v. Natural Resources Defense Council*, 421 U.S. 60 (1975). However, the Court failed to undertake an analysis of the thoroughness, validity of reasoning, and consistency attendant upon the agency action; instead it focused upon the "linguistics" of the statute itself and the underlying statutory policy to conclude that the "sufficiently reasonable" test had been met.

2. The *Train* Case.

The "sufficiently reasonable" formulation originated with the *Train* case. But, in that case the Court in fact undertook its own extensive analysis of the statute, the legislative history and the decisions of Courts of Appeals in several circuits in order to provide the foundation for its decision. Little actual attention was paid to the agency interpretation, and to the extent that notice was paid, it was descriptive but not analytical. In fact, three years after *Train* was decided, this Court rejected an argument that it should defer to an administrative construction of a statute. *Adamo Wrecking Co. v. United States*, 434 U.S. 275 (1978). The Court dealt with the *Train* case in footnote 5, at 287, as follows:

In *Train v. Natural Resources Defense Council*, 421 US 60, 43 L Ed 2d 731, 95 S Ct 1470 (1975), relied upon by Brother Stevens' dissent, this Court was not persuaded by 'a single sentence in the Federal Register,' post, at 301 n 18, 54 L Ed 2d 558, but by our own 'analysis of the structure and legislative history

of the Clean Air Amendments,' 421 US, at 86, 43 L Ed 2d 731, 95 S Ct 1470, which led us to a result consistent with the Administrator's prior practice.

Further, the Court in *Adamo Wrecking* relied upon the *Skidmore* pronouncement in rejecting the agency construction, stating

The Administrator's remarks with regard to these regulations clearly demonstrate that he carefully considered available techniques and methods for controlling asbestos emissions, but they give no indication of 'the validity of [his] reasoning' in concluding that he was authorized to promulgate these techniques as an 'emission standard,' within the statutory definition. Since this Court can only speculate as to his reasons for reaching that conclusion, the mere promulgation of a regulation, without a concomitant exegesis of the statutory authority for doing so, obviously lacks 'power to persuade' as to the existence of such authority. *Id.* at 287.

Thus it is clear that the vitality of *Skidmore* is not affected by *Train* and is confirmed by *Adamo Wrecking* and *General Electric Co.*

3. The *Federal Election Commission* Case.

In the other case cited by the Court of Appeals, this Court was faced with the question of the deference to be paid to an agency interpretation which had been rejected by the Court of Appeals. Although disagreeing with the conclusion of the Court of Appeals, this Court said:

We agree that the thoroughness, validity, and consistency of an agency's reasoning are factors that bear upon the amount of deference to be given an agency's ruling. See *Adamo Wrecking Co. v. United States*, 434 US 275, 287, n 5, 54 L Ed 2d 538, 98 S Ct 566 (1978); *Skidmore v. Swift & Co.* 323 US 134, 140, 89 L Ed 124, 65 S Ct 161 (1944). 454 U.S. at 37.

This Court undertook a detailed evaluation of the Federal Election Commission's position, noting the consistency and

unanimity of the Commission's construction of the statute and the three separate reports from the Commission's General Counsel which provided a number of arguments to support the Commission's construction. Then, having concluded that the Commission's repeated interpretation was entitled to deference, the Court applied *Train's* "sufficiently reasonable" standard and determined that the standard had been met.

Federal Election Commission demonstrates that achievement of the *Train* standard is not to be measured in a vacuum but rather against the well-established criteria enunciated in *Skidmore*.

4. Other Cases.

On several other recent occasions this Court, met with suggestions that an agency interpretation is entitled to deference, has engaged in the kind of analysis set forth in *Skidmore*. For example, in *General Electric Co. v. Gilbert*, *supra*, Equal Employment Opportunity Commission guidelines were found "not [to] receive high marks when judged by the standards enunciated in *Skidmore*." *Id.* at 143. The guideline in question was issued eight years after enactment of the statute, but of greater importance was the contradiction between the guideline and an earlier agency interpretation.

Similarly, in *Batterton v. Francis*, 432 U.S. 416 (1977), there was a question of the weight to be given to a regulation promulgated by the former Department of Health, Education and Welfare. The Court held that, because the regulation was adopted pursuant to an express delegation of authority from Congress to prescribe standards for defining the term "unemployment," such regulations have "legislative effect." *Id.* at 425. Footnote 9 at 425 amplified as follows:

Legislative, or substantive, regulations are 'issued by an agency pursuant to statutory authority and which implement the statute, as, for example, the proxy rules issued by the Securities and Exchange Commission Such rules have the force and effect of law.' [Citations omitted].

By way of contrast, a court is not required to give effect to an interpretative regulation. Varying degrees of deference are accorded to administrative interpretations, based on such factors as the timing and consistency of the agency's position, and the nature of its expertise. [Citing *Skidmore* and *General Electric Co.*]

In *SEC v. Sloan*, 436 U.S. 103 (1978), the government argued that the Commission's longstanding and consistent interpretation of a statute was entitled to great deference. Although granting the validity of this proposition as a general principle of law, this Court did not defer to the agency. The Court pointed out that, in none of the instances when the commission had taken the kind of action at issue, had the commission "actually addressed in any detail the statutory authorization under which it took that action." *Id.* at 117. The Court quoted from *Adamo Wrecking* that portion of footnote 5 which refers to *Skidmore*:

This lack of specific attention to the statutory authorization is especially important in light of this Court's pronouncement in *Skidmore v. Swift & Co.*, 323 US 134, 140, 89 L Ed 124, 65 S Ct 161 (1944), that one factor to be considered in giving weight to an administrative ruling is 'the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.'

More recently, in *St. Martin Lutheran Church v. South Dakota*, 451 U.S. 772 (1981), this Court was urged to adopt the Labor Department's construction of a statutory term. The Court did not do so, and dealt with the government's position as follows, at 783 n. 13:

The amount of deference due an administrative agency's interpretation of a statute, however, 'will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those

factors which give it power to persuade, if lacking power to control.' *Skidmore v. Swift & Co.*, 323 US 134, 140, 89 L Ed 124, 65 S. Ct. 161 (1944). Carefully considering the merits of the Secretary's interpretation, we believe it does not warrant deference.

Finally, just three months before the Court of Appeals decision involved in this petition, the same Circuit considered the issue of the deference to be paid to an interpretation by the Department of Health and Human Services of its own regulations. *Saint Mary of Nazareth Hospital Center v. Schweiker*, 718 F.2d 459 (D.C. Cir. 1983). Quoting from both *Skidmore* and *Batterton*, and citing *General Electric Co.*, among other cases, the District of Columbia Circuit held: "In sum, neither consistency nor timing nor expertise weigh heavily in favor of deferring to HHS in this matter." *Id.* at 466.

5. Conclusion.

The Court of Appeals has failed to acknowledge the norms established and repeatedly applied in determining whether an agency opinion or action is entitled to deference. As a result of this failure, the Court of Appeals did not undertake an examination of the way in which the Maritime Subsidy Board and the Secretary of Commerce came to the conclusion that Section 605(c) required no further hearing after the amendment of the Waterman application. Had such an examination been conducted it would have revealed that the criteria spelled out in *Skidmore* were simply not met and consequently that no deference was owed to the agency position.

B. The Board's Interpretation of Section 605(c) Is Not Entitled to Judicial Deference.

1. Introduction.

This section undertakes an evaluation of whether the interpretation by the Board warrants judicial deference. This sort of evaluation was not made by the Court of Appeals, despite the clear and numerous precedents provided by this Court.

2. Thoroughly Considered Construction.

The agency reasoning in adopting its interpretation of Section 605(c) is totally absent. There are only two documents in the administrative record related to the issue presented. One is the Order Denying Requests for Reopening (Appendix E), which contains two sentences simply stating that the Board had previously considered and rejected the arguments made by petitioners. (Of course, as a matter of fact, the specific argument concerning Section 605(c) had not been made previous to Sea-Land's Petition for Reconsideration on December 11, 1978 (Appendix M), and thus could not have been previously considered.) The second document is the one-sentence order denying Secretarial review (Appendix F); it merely says that the petitions have been considered and are denied.

The complete lack of explanation for rejecting the request for a hearing under Section 605(c) is in sharp contrast to the record before this Court in *Federal Election Commission, supra*. There the record included three separate reports from the agency's General Counsel providing analysis and argumentation supportive of the position taken by the Commission. Instead, the present matter is akin to *Adamo Wrecking*, where the Court said that because it could only speculate as to the reasons behind the Administrator's conclusion, "the mere promulgation of a regulation, without a concomitant exegesis of the statutory authority for doing so, obviously lacks 'power to persuade' as to the existence of such authority." 434 U.S. 275 at 287, n. 5. Also similar is *Sloan, supra*, where, despite the numerous times the agency had taken a particular action, it had never offered an explanation of its statutory authority for doing so. Deference was accorded in *Federal Election Commission*, but not accorded in either *Adamo Wrecking* or *Sloan*.

3. Consistent Construction.

The issue whether Section 605(c) requires a hearing for the purpose of considering whether unsubsidized operations may be authorized as an original matter in an operating-differential subsidy contract has not been decided before. This is therefore a matter of first impression, both for the courts and,

more to the point, for the agency. No party in the proceedings below was able to cite any prior decision (formal or informal), any rule or guideline, or any transcript of Board proceedings bearing directly upon this question.

There is a striking contrast between these circumstances and those in *Zenith Radio Corp. v. United States*, 437 U.S. 443 (1978), where the Treasury Department's position had been maintained uniformly for over 80 years. Further, *Udall v. Tallman*, 380 U.S. 1 (1965), is a case where the Secretary of Interior's interpretation had been a matter of public record and discussion long before the origin of the controversy. And in *NLRB v. Hendricks Cty. Rural Electric Membership Corp.*, 454 U.S. 170 (1981), this Court concurred with an administrative interpretation which had existed for over 40 years. However, the duration of the practice or interpretation will not necessarily, of itself, be sufficient to warrant deference, as is demonstrated by the *Sloan* and *St. Martin Lutheran Church* cases, *supra*.

In *Udall v. Tallman*, *supra*, the Court observed that one reason why courts are reluctant to disturb a long-continued agency interpretation is that affected parties act in reliance upon a settled construction. *Id.* at 17, 18. There is no such reliance, however, where the issue has never before been considered and decided by the agency. In the present matter, there is no history whatsoever of an agency construction. Thus, there is no possibility that reasonable expectations based on past agency performance will be defeated if the agency's action is not upheld.

4. Contemporaneous Construction.

A third factor which this Court considers in determining whether an agency interpretation deserves deference is whether the agency construction or practice was adopted early in the administration of a particular statute. In *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294 (1933), the Court upheld a Tariff Commission practice, noting:

The practice has peculiar weight when it involves a contemporaneous construction of a statute by the

men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are untried and new.

Id. at 315.

In *General Electric Co.*, *supra*, a guideline first promulgated eight years after the enactment of the statute was "not a contemporaneous interpretation." *Id.* at 142.

The Maritime Subsidy Board's January 1979 order denying Sea-Land's petition for reopening and reconsideration (in which the Board took the position, for the first time, that the Section 605(c) hearing was not required for the amended application) came over 40 years after the enactment of Section 605(c) as part of the Merchant Marine Act of 1936. By no stretch of the imagination can the Board's construction be considered contemporaneous.

5. Validly Reasoned Construction.

Because of the Board's and the Secretary's summary dismissals of Sea-Land's arguments with respect to the Section 605(c) hearing requirement, what reasoning process led to the Board's conclusion is impossible to divine. However, analogy to similar circumstances establishes patent inconsistency with this particular conclusion.

Most obviously, the interpretation of the Board is inconsistent with General Order 80 of the Maritime Administration, 46 C.F.R. §§ 281.11-281.17. Since 1957, General Order 80 has provided a procedure whereby subsidized operators may seek the permission of the Maritime Administration to make a nonsubsidized voyage, as well as criteria for the granting of such permission. By its terms, it applies where the ODS contract does not specifically authorize the nonsubsidized voyage which the operator wishes to make.

Three provisions of the Order are particularly noteworthy. First, an application for unsubsidized voyage must show a "definite need" for the voyage, 46 C.F.R. § 281.15(a). Clearly, this requirement is in accord with the adequacy of service determination required under Section 605(c).

Second, except as the Maritime Administrator determines otherwise, where the proposed nonsubsidized voyage is on a route on which (1) U.S.-flag berth service is maintained and (2) the subsidized operator does not maintain berth service, there is a special requirement for approval. In such circumstances, the application will not be approved unless the applicant obtains the written consent of the U.S.-flag operators on that route, 46 C.F.R. § 281.11(d). This amounts almost to a *de facto* veto power in the hands of other U.S.-flag operators.

Finally where nonsubsidized voyages are or may become a regular service, the Maritime Administrator is authorized to call a public hearing before making a final decision, and such hearing is to consider evidence on the adequacy of service and such other evidence which he deems pertinent, 46 C.F.R. § 281.13.

It would indeed be anomalous if a proposed nonsubsidized voyage were subject to such scrutiny when not authorized in the contract, but sweeping contract authorization of nonsubsidized voyages could be granted without any hearing of U.S.-flag operators or any formal determination on the adequacy of U.S.-flag service in the affected trade. Clearly, this cannot be the case. General Order 80 was necessarily issued with the view that nonsubsidized operations for which original contract authorization is sought are subject to Section 605(c). Its purpose is to fill the gap in the law that would exist if a subsidized operator were entirely free to make nonsubsidized voyages for which original contract authorization, issued upon proper determinations under Section 605(c), had not been obtained.

The continuing vitality of General Order 80 was affirmed by the Maritime Administrator when he issued a determination making a minor exception to the "consent" requirement of 46 C.F.R. § 281.11(d). That statement provides in part,

Controls are exercised over non-subsidized operations to ensure that the continuity and quality of subsidized operations will not be adversely affected. Such controls are also intended to safeguard against improper competitive practices and to prevent operations prejudicial to the purposes and policy of the Act. There is thus a need to strike a balance between

operating flexibility for the subsidized operator and adverse impact on other U.S.-flag operators.⁵

In addition, the statutory interpretation at issue here is inconsistent with case decisions of the Board and the courts regarding Section 605(c). Past efforts to limit the scope of that provision, where the limitations would be inconsistent with the language or purpose of the statute, have generally been rejected by the Board. The first such effort was made, in fact, in the very first case dealing with Section 605(c), Docket No. S-1, which was decided by the U.S. Maritime Commission (predecessor of the Board) in 1938.⁶ In that case, two carriers which were serving the same route sought long-term operating-differential subsidy for their operations, and one of these carriers was operating under a temporary subsidy contract which had been previously granted. That carrier argued that no subsidy should be awarded to its competitor, and its position was based in part on the contention that the phrase contained in the first clause of Section 605(c), "which would be in addition to the existing service, or services," should be interpreted to mean "which would be in addition to the existing *subsidized* service, or services." In a key decision, this attempt to limit the protection accorded by Section 605(c) to existing subsidized operators was summarily rejected by the Maritime Commission. As in that case, there is an effort here to read into the statute qualifying language which simply is not there.

Also particularly relevant here are other cases in which the Board considered applications which sought only an increase in the number of vessels to be operated.⁷ The subsidized operators in those cases strongly contended that Section 605(c) was inapplicable to their applications, but the Board rejected this position. In its holdings, the Board focused on the fact that Section 605(c) is concerned with vessel service, and despite the fact that the sailings would be performed without additional

⁵ Determination Relative to Certain Non-Subsidized Voyages of Subsidized Operators of Vessels, 46 Fed. Reg. 48198 (1981).

⁶ American South African Line, Inc., Seas Shipping Co., Inc., 3 U.S.M.C. 277 (1938).

⁷ American President Lines, Ltd., 12 S.R.R. 168 (MSB 1971); Additional Subsidized Service on Trade Routes 29 & 17, 14 S.R.R. 387, at 390-91 (MSB 1974).

subsidy, it held that they did constitute service in addition to existing service within the meaning of Section 605(c). On another matter the Board has held that where an application and the notice thereof did not include a particular service, the applicant cannot add that service to his application during the course of the Section 605(c) hearing thereon. The reason for such holdings is that it is necessary to provide proper notice *prior* to the hearing so that all interested parties will have an opportunity to be heard.⁸

In one major case, however, the Board failed to construe Section 605(c) properly, and intervention by the D.C. Circuit Court of Appeals was necessary to correct the Board's error.⁹ In that case, the applicant filed an application which, although substantially different from an earlier application, was denominated as an amendment to it. The Secretary approved the later application, despite the fact that no notice or opportunity for hearing thereon had been provided. In response to the challenge of Sea-Land, the Secretary argued that the notice and opportunity for hearing provided with regard to the earlier application satisfied the statutory requirement with regard to the later application, or that notice of the latter was not required because it was merely an amendment to the earlier application. This position was rejected by the D.C. Circuit which required that Sea-Land, the only carrier which had challenged approval of the application, be accorded a full and fair opportunity to be heard.

This concern that Section 605(c) not be eroded is, of course, well taken. This provision has a vitally important purpose: one that is important to the existing U.S.-flag operators on any particular route, and important to the fulfillment of the broader purposes of the Act.

Consequently, to the extent that General Order 80 and the cases cited above provide illumination as to the reasoning applicable to the question at issue, they lead to a conclusion directly opposed to that reached by the Board and confirmed by the Secretary.

⁸ Lykes Bros. Steamship Co., Inc., 7 S.R.R. 643, at 650 (MSB 1966); States Marine Corp., 1 S.R.R. 1, 5 (MSB 1959).

⁹ Sea-Land Service, Inc. v. Connor, 418 F.2d 1142 (D.C. Cir. 1969).

6. Conclusion.

The above sections have reviewed how the facts of this case measure up to this Court's criteria for granting deference to an agency interpretation of a statute which the agency is charged with administering. In summary, the Maritime Subsidy Board's construction of the applicability of Section 605(c)'s hearing requirement to the amended Waterman application

(1) does not represent a thoroughly considered position;

(2) does not represent a consistent position over a significant period of time;

(3) was in no way contemporaneous with enactment of the legislation; and

(4) reflects unexpressed reasoning which is fundamentally at odds with agency regulations and interpretations in related circumstances.

For these reasons, the Court of Appeals erred in paying deference to the agency construction. The Maritime Subsidy Board's interpretation was not due any consideration because it utterly lacked any of the persuasive attributes which would have merited it some deference.

II. IN IMPLEMENTATION OF THE PURPOSES AND POLICY OF THE MERCHANT MARINE ACT, 1936 AND SECTION 605(c) THEREOF, SECTION 605(c) SHOULD BE INTERPRETED TO BE APPLICABLE TO A PROVISION OF AN OPERATING-DIFFERENTIAL SUBSIDY CONTRACT WHICH WOULD AUTHORIZE THE INITIATION OF NONSUBSIDIZED OPERATIONS BY CONTRACT VESSELS, WHERE THOSE OPERATIONS WOULD BE ON AN ESSENTIAL TRADE ROUTE ALREADY SERVED BY OTHER U.S.-FLAG OPERATORS.

A. Introduction.

While the provisions of Section 605(c) of the Merchant Marine Act, 1936 are not addressed in any prior decisions of this

Court, the Court has previously considered other provisions of the maritime subsidy program established under that Act. *Seatrains Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572 (1980). In that case, the Court was very sensitive to the adverse effect that misuse of subsidy could have upon nonsubsidized operators.¹⁰ Here, as is explained in greater detail *infra*, the interpretation of Section 605(c) rendered by the Board could adversely impact subsidized as well as nonsubsidized U.S.-flag operators. This result makes it clear that the interpretation rendered by the Board is contrary to the purpose of that section and of the Act. These purposes are elaborated upon below, but preliminarily, the terms and the statutory context of Section 605(c) should be described.

Sections 601 and 603(a) of the Act, 46 U.S.C. §§ 1171, 1173(a), in pertinent part, authorize the Secretary of Commerce¹¹ to enter into contracts with U.S. citizens to provide a subsidy for the operation of a particular vessel or vessels on an essential trade route, where (1) such operation is necessary to meet foreign-flag competition, (2) the subsidy is necessary to place the proposed operation on a parity with the operations of foreign competitors, and (3) the applicant meets certain qualifications.

The contracts for operating-differential subsidy—as is evidenced by the contract at issue here—specifically identify the routes on which service is required or authorized (Appendix L, at 261-271), and the vessels which are to provide this service (*id.* at 281). Those vessels are termed “subsidized vessels” in

¹⁰ Thus regarding the operation in domestic trade of a vessel built with construction-differential subsidy, the Court stated,

[A] vessel with an outstanding CDS that was completely free to enter and depart the domestic trade would be in an extraordinarily favorable competitive situation even if it was required to repay a proportionate amount of its subsidy whenever it did so. Absent some restriction on its ability to move from one market to the other, it would be a formidable force in both, capable of taking advantage of every shift in trade and profitability, skimming the cream and leaving what remains to those less mobile. It could, in a very real sense, have the best of both worlds. 444 U.S. at 588 (footnote omitted).

¹¹ See n. 3 *supra*.

the contract.¹² The contracts also prohibit the operator from using the subsidized vessels in any nonsubsidized operation not authorized in the contract, unless the prior approval of the Maritime Administration is obtained.¹³ The Maritime Administration regulations governing later requests for approval to make nonsubsidized voyages, which are contained in General Order 80, were discussed above. The authority of the Secretary to enter into ODS contracts was vested in the Board by Departmental Order.¹⁴

Section 605(c), insofar as herein relevant, provides:

No contract shall be made under this subchapter with respect to a vessel to be operated in an essential service served by citizens of the United States which would be in addition to the existing service, or services, unless the Secretary of Commerce shall determine after proper hearing of all parties that the service already provided by vessels of United States registry is inadequate, and that in the accomplishment of the purposes and policy of this chapter additional vessels should be operated thereon

Thus this provision, the first clause of Section 605(c), imposes a key limitation on the authority of the Secretary in the making of contracts where two circumstances are present: the proposed contract provides for a new service on an essential trade route, and that trade route is already served by U.S. citizens.¹⁵ In these circumstances, the Secretary can enter into the contract only if, "after proper hearing of all parties," he makes two

¹² Contract No. MA/MSB-450, Art. II-28(a).

¹³ *Id.*, Art. I-3(d).

¹⁴ Department of Commerce Organization Order 25-2, § 4.a., 45 Fed. Reg. 80857 (1980).

¹⁵ The second clause of Section 605(c) is, under Board precedent, applicable only where the proposed contract concerns an existing service of the applicant, and the two clauses have been treated as being mutually exclusive in their application. *See* Waterman Steamship Corp., Appendix C, at 4c. Because Waterman did not contend in this proceeding that it had existing service on TR's 5-7-8-9, 6 or 11 (Appendix C, at 5c), only the first clause of Section 605(c) is relevant herein. Thus all references herein to Section 605(c) are to the first clause of that provision.

determinations: the current service provided by U.S.-flag vessels is inadequate, and the proposed new service would be in furtherance of the purposes and policies of the Act. The responsibility of the Secretary for conducting hearings and making these determinations was also vested in the Board by Departmental Order.¹⁶

In the present context, it is noteworthy that the relevant provision of Section 605(c) is not, by its terms, limited to service for which subsidy is being sought. Indeed, the provision contains no reference whatsoever to subsidy or financial aid. Rather, the focus of the provision is on vessel service: that in which the applicant proposes to engage under the terms of his contract, and that already provided by U.S.-flag carriers on the route or routes in question. Put another way, the statute is concerned with *all* services which are to be performed by vessels covered by the contract.

B. Purpose of the Section and of the Act.

As to the purpose of the Act, there can be little disagreement, for its purpose is evident from the Declaration of Policy contained in Section 101 thereof, 46 U.S.C. § 1101. The elements of this provision which are most relevant herein are the following:

It is necessary for the national defense and development of its foreign . . . commerce that the United States shall have a merchant marine (a) sufficient to carry . . . a substantial portion of the water-borne export and import foreign commerce of the United States and to provide shipping service essential for maintaining the flow of such . . . foreign water-borne commerce at all times [and] (b) capable of serving as a naval and military auxiliary in time of war or national emergency It is declared to be the policy of the United States to foster the development and encourage the maintenance of such a merchant marine.

¹⁶ Department of Commerce Organization Order 25-2, *supra* n. 14, § 4.b.

Consistent with the overall purpose of the Act, the specific purpose of Section 605(c) is to prevent overtonnaging on the route or routes which are before the Board by virtue of a subsidy application. As the Board has stated,

Section 605(c) is explicitly aimed against overtonnaging a route, line or service. Congress has specifically delegated this watch-dog duty to the agency.¹⁷

Other Board decisions and initial decisions of administrative law judges are to the same effect,¹⁸ as is a decision of the District of Columbia Circuit.¹⁹

The purpose of Section 605(c) of preventing overtonnaging is highlighted in particular by the manner in which the determination on the adequacy of U.S.-flag service on a particular trade route is made thereunder. As was noted above, this determination is one which, under Section 605(c), must be made after proper hearing, and the Board has held that only those persons who provide U.S.-flag service in the trade in question have standing to participate in the hearing.²⁰

At the heart of the adequacy determination is a comparison of the cargo pool and the U.S.-flag vessel lift capacity likely to be available at some reasonable point in the future.²¹ In this case, for example, in which hearings were held in late 1975 and early 1976, both Sea-Land and Waterman presented, for each of the trade routes in issue, a capacity/cargo forecast for the year 1980, and these forecasts were based on highly detailed analyses of statistical information on these trades.²²

¹⁷ Lykes Bros. Steamship Co., Inc., 7 S.R.R. 643, 652 (MSB 1966).

¹⁸ American President Lines, Ltd.—Atlantic/Straits Service, 1 M.A. 143, 159, 172 (1963); Additional Subsidized Service on Trade Routes 29 & 17, 14 S.R.R. 387, 391 (MSB 1974); Waterman Steamship Corp., Appendix B, at 52b-53b.

¹⁹ Sea-Land Service, Inc. v. Kreps, 566 F.2d 763, 774 (D.C. Cir. 1977).

²⁰ Waterman Steamship Corp., Appendix C, at 26c-27c; National Shipping Corp., 14 S.R.R. 543, 546 (MSB 1974).

²¹ See, e.g., Waterman Steamship Corp., Appendix B, at 54b; American President Lines, Ltd., 21 S.R.R. 1, 7 (MSB 1980).

²² Waterman Steamship Corp., Appendix B, at 17b-45b.

Findings regarding capacity and cargo are made based upon the evidence presented by the parties.²³

Using these findings, a determination is made on whether U.S.-flag service on the route will be adequate. The test of adequacy established by the Secretary and employed by the Board is whether the U.S.-flag fleet will be capable of lifting the highest percentage of cargo practically attainable without the additional service.²⁴ The Board does look to, as a rule of thumb for adequacy, whether there will be U.S.-flag capacity capable of carrying 50 percent of the available cargo.²⁵ However, this is only a rule of thumb, and the true test is whether the U.S.-flag fleet will be capable of lifting the highest percentage of cargo practically attainable.²⁶

It is readily apparent that this test of adequacy is fully in accord with the purpose of Section 605(c) of preventing overtonnaging. For if the existing U.S.-flag fleet on a particular route will be capable of lifting the highest percentage of cargo practically attainable, then it follows that any addition of capacity to it would overtonnage the route. It would lead not to any increase in the U.S.-flag share of the trade, but only to a shifting of cargoes among U.S.-flag carriers and unused U.S.-flag capacity in that trade. Such a result clearly would not be in the interest of the U.S.-flag carriers which already serve that route, and thus the Board was quite correct when, in its final opinion in this case, it referred to Section 605(c) as a "simple and pragmatic safeguard to the health of the existing U.S.-flag service" ²⁷

Moreover, such a result would be detrimental to the development and maintenance of the U.S.-flag fleet, and thus it would be contrary to the purpose of the Act. In *Sea-Land Service, Inc. v. Kreps*, the District of Columbia Circuit noted that subsidy is awarded to the owners of U.S.-flag vessels, but

²³ See, e.g., *Waterman Steamship Corp.*, Appendix B, at 45b-47b; *Waterman Steamship Corp.*, Appendix C, at 20c-21c.

²⁴ *Atlantic Express Lines of America, Inc.*, 1 M.A. 104, 110 (Sec'y of Comm. 1963); *Lykes Bros. Steamship Co., Inc.* 18 S.R.R. 1389, 1404 (MSB 1978).

²⁵ *Id.*

²⁶ *Sea-Land Service, Inc. v. Kreps*, *supra* n. 19, 566 F.2d at 767 n. 18, 777 n. 69.

²⁷ *Waterman Steamship Corp.*, Appendix C, at 14c.

the benefit of the subsidy is found in the promotion of the American merchant marine.²⁸ Likewise, while the immediate beneficiary of the limitation on the authority to make contracts contained in Section 605(c) is the existing U.S.-flag service on a particular route, the ultimate benefit of this limitation is found in the development and maintenance of a healthy American merchant marine.

It should also be noted that the Court of Appeals here, while deferring to the Board's interpretation of Section 605(c), did recognize that authorization to conduct nonsubsidized operations in the circumstances presented here does cause competitive harm to other operators (Appendix A, at 5a). The Court also expressly left open the question of whether the Act requires the Board, in authorizing nonsubsidized operations, to consider their competitive impact, stating, "It may be asserted . . . that equivalent standards [to those of Section 605(c)] or lesser standards should be inferred from the totality of the Act." (*id.* at 7a, n. 3).

C. Applying Section 605(c) to Proposed Nonsubsidized Operations by Subsidized Operators Which Are Otherwise Within Its Terms Is Consistent with the Purpose of the Section and of the Act.

Having ascertained the purpose of Section 605(c) and of the Act, it is now necessary to determine whether application of the provision to proposed nonsubsidized service in the circumstances presented here is consistent with these purposes. The precise circumstances, to repeat, are that the applicant is seeking authority in his contract to conduct nonsubsidized operations with vessels covered by the contract, the operations would be on an essential trade route on which the applicant does not have existing service, and that route is already served by other U.S.-flag operators.

Clearly, application of Section 605(c) to proposed nonsubsidized service in the circumstances herein presented is consistent with the purpose of that provision and of the Act. As

²⁸ *Supra* n. 19, 566 F.2d at 777.

established above, the overall purpose is to foster the development of the U.S.-flag fleet by ensuring that contract-authorized operations will not overtonnage an essential trade route. The point that must be stressed in determining the present question is the following: whether or not a vessel is to receive subsidy for a particular operation is irrelevant to a determination on whether that operation would contribute to overtonnaging. If the operation of the vessel on a particular essential trade route would contribute to overtonnaging on that route, then that operation would be detrimental to the remainder of the U.S.-flag fleet on that route regardless of whether that operation is to be subsidized. Thus, applying Section 605(c) to proposed nonsubsidized operations which are otherwise within its terms is not only consistent with the purposes of this section and the Act; such application is essential if these purposes are to be fully realized.

It is not necessary for Sea-Land to construct any hypotheticals in order to illustrate this point, for the facts of this case present one of the more egregious examples of what can happen as a result of a holding that Section 605(c) does not apply to operations for which subsidy is not being sought. This is so for two reasons: first, the contract provision at issue here authorized nonsubsidized operations by a subsidized operator on an essential trade route, TR 5-7-8-9, on which the Board had determined that U.S.-flag service is and will for the foreseeable future be adequate (Appendix C, at 27c); secondly, that contract provision authorized Waterman to conduct the nonsubsidized operations both as separate voyages independent of its subsidized service, and on a deviation basis, that is, as part of and in conjunction with its subsidized service (Appendix L, at 271).

As a result of these facts, even if Waterman used only the authority to conduct separate nonsubsidized voyages on TR 5-7-8-9, it would be adding capacity to a route on which the Board has determined that U.S.-flag service is and will be adequate. This determination, as noted above, is a determination that the existing U.S.-flag fleet on the route will be capable of lifting the highest percentage of cargo practically attainable.

Put simply, in exercising this authority Waterman would necessarily be overtonnaging the route to the detriment of other U.S.-flag carriers. This is precisely the evil which Congress sought to prevent in Section 605(c). It would, in addition, be detrimental to the development of a healthy U.S.-flag merchant marine and thus would be counter to the overall purpose of the Act.

Moreover, if Waterman used the authority to conduct operations on this trade route on a deviation basis—that is, in conjunction with its subsidized service—the competitive impact upon the remainder of the U.S.-flag fleet would be even greater. The reason for this is that despite the fact that such operations would be labeled as “nonsubsidized operations,” they would in reality be conducted almost entirely with subsidy. The contract provides Waterman with subsidy for voyages on TR 21, that is, between ports on the U.S. Gulf and Western Europe (Appendix L, at 261). TR 5-7-8-9, as noted above, is also a trans-Atlantic route, for it covers the trade between ports on the U.S. North Atlantic and Western Europe.²⁹ Thus in serving the latter route on a deviation basis, Waterman would stop at the North Atlantic ports to load or discharge cargo both before and after making its subsidized Atlantic crossing. Under the Contract, the time consumed in making the North Atlantic port calls would not be included in the calculation of the subsidy (Appendix L, at 271). However, Sea-Land calculated that this provision would result in the subsidy being reduced by only about 10 percent.³⁰ Sea-Land stated this estimate in its briefs in the courts below, and neither Waterman nor the Federal Defendants disputed it. Thus to the extent Waterman serves TR 5-7-8-9 on a deviation basis, not only does it overtonnage the route, but also it does so with operations which are 90 percent subsidized. The significant competitive impact that such operations would have on other U.S.-flag operators on the route is readily apparent.

Before this portion of the argument is completed, one additional point should be made. That is that, as is implicit in

²⁹ Maps showing all of the trade routes involved appear as Appendix K hereto.

³⁰ This figure was based on an estimate that Atlantic Coast calls would consume about three days' steaming and port time as part of an approximately thirty day voyage from the Gulf Coast to Europe and return.

all of the above, the issue presented in this case is not one of subsidized operators versus unsubsidized operators. This point was made quite clearly in this case, because the authorization to Waterman to conduct nonsubsidized operations was protested vociferously to both the Board and the Secretary by Farrell Lines, Inc., which provided *subsidized* service on TR 5-7-8-9 (Appendix E, at 2e). The existing U.S.-flag service on any trade route may consist in whole or in part of subsidized operators, and these operators, as well as unsubsidized ones, stand to be disadvantaged if the decision of the Board limiting the scope of Section 605(c) is upheld.

CONCLUSION

This Court observed in *Federal Election Commission, supra*, that, "[T]he courts are the final authorities on issues of statutory construction." 454 U.S. at 32. Under the decision of the Court of Appeals in this case, the courts would abdicate that role in the face of any agency construction of a statute, and those constructions would be, essentially, unreviewable. It should be stressed that the present case is not merely one of the "thoroughness, validity, and consistency of an agency's reasoning" (454 U.S. at 37) being questionable; it is instead a case in which such reasoning was nonexistent. Consequently, we urge that a writ of certiorari should issue to review the opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

Of Counsel:
RAGAN & MASON
900 17th Street, N.W.
Washington, D.C. 20006

EDWARD M. SHEA
Counsel of Record
JOHN E. VARGO
MARTIN J. FITZGERALD
900 17th Street, N.W.
Washington, D.C. 20006
(202) 296-4750

Attorneys for Petitioner
Sea-Land Service, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of May, 1984, I served three copies of the foregoing Petition for a Writ of Certiorari and the separately filed Appendix upon all parties required to be served. Pursuant to Rule 28.3 and 28.4, service was made upon the Solicitor General by mailing three copies, first-class postage prepaid, to:

Solicitor General
Department of Justice
Washington, D.C. 20530

Pursuant to Rule 28.3 service of three copies each was made upon the following by hand delivery or by mail, first-class postage prepaid:

ROBERT S. GREENSPAN, ESQ.
Assistant Director,
Appellate Section
Civil Division
Department of Justice,
Room 3616
Washington, D.C. 20530

ROBERT A. PEAVY, ESQ.
MORGAN, LEWIS & BOCKIUS
1800 M Street, N.W.
Washington, D.C. 20036

.....
EDWARD M. SHEA